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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1164

DEBORAH A. NORTHCROSS, *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

LOUIS R. LUCAS
WILLIAM E. CALDWELL
Ratner, Sugarmon and Lucas
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Petitioners

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Respondents urge that the denial of costs, including legal fees, was proper in this case because Section 718 of the Emergency School Aid Act is "couched in permissive terms" and the Sixth Circuit's action did not constitute an abuse of "its discretion." Brief in Opposition, p. 3. Petitioners agree that the Sixth Circuit's denial of such costs and fees was undoubtedly based on such an interpretation of § 718. This interpretation of § 718, urged by Respondent and apparently relied on by the Sixth Circuit Court of Appeals, has been expressly rejected by the Fifth Circuit Court of Appeals in *Johnson* v. *Combs*, Petition for Writ of Certiorari, pp. 6a-12a. *Johnson* concluded, as had this Court, *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), that the statute did not put the question of costs and fees within the broad discretion of the courts,

but made such awards mandatory in the absence of special circumstances.[1] It is this inconsistency between the instant case, on the one hand, and *Johnson* and *Newman* on the other, which requires the granting of the Writ in this case.

Respondents maintain, second, that denial of costs and fees was proper because plaintiffs had not prevailed on appeal, as required by Rule 39, Federal Rules of Appellate Procedure. Brief in Opposition, pp. 2-3. The Sixth Circuit, however, clearly believed it had given plaintiffs all the relief they sought on appeal:

> "[Plaintiffs] request only that this Court direct the District Court to prepare a timetable for further desegregation. We believe such a request is reasonable.

Respondents, in petitioning this Court for a Writ of Certiorari to review the Sixth Circuit's decision on the merits in this case, also recognized that plaintiffs had prevailed on appeal:

> Petitioners appealed from the decision of the District Court and moved the Court for a stay of the District Court's order [Plan A] pending the outcome of the appeal. Respondents filed a cross appeal asking that additional pupil transportation be required. On June 2, 1972, the Sixth Circuit Court of Appeals granted petitioners' request for a stay. Following an expedited hearing of the appeal, the majority of the Court of Appeals on August 29, 1972, vacated the stay and directed the implementation of Plan A. The Court

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[1] The Fourth Circuit decision reversed by this Court in *Newman* had held that Title II of the 1964 Civil Rights Act merely "authorizes the court in its discretion to allow the prevailing party (other than the United States) a reasonable attorney's fee as part of costs." 377 F.2d 433, 437 (1967).

of Appeals also went beyond the order of the District Court in directing that Plan A should be regarded as only the first step in a more massive program of pupil transportation and instructed the District Court to prepare a timetable for additional desegregation.[2]

Respondents still concede that plaintiffs obtained all the relief they sought on appeal, but urge that plaintiffs did not obtain on appeal certain further relief which plaintiffs did not seek on appeal but had sought in the District Court. The prevailing party on appeal, however, is determined with reference to the relief sought on appeal, not remedies pressed at an earlier time but abandoned before the appeal. There is no reason to believe that the Sixth Circuit adopted or applied *sub silentio* the unprecedented and mistaken construction of Rule 39 now suggested by Respondents.

Finally, Respondents suggest that the Court of Appeals may have denied costs, including attorneys fees, because plaintiffs' petition for rehearing of November 3, 1972 was filed out of time. Brief in Opposition, pp. 3-4.[3] This contention is clearly refuted by the record in this case. Plaintiffs' initial application for costs was filed, not in November, 1972, but on September 7, 1972, in the form of a Bill of Costs. See Federal Rule of Appellate Procedure, Rule 39(c). That application was undeniably timely, and Respondents do not claim otherwise. This first application

[2] Petition for Writ of Certiorari, *Board of Education of the Memphis Schools* v. *Northcross*, No. 72-677, p.7, *cert. denied*, 41 U.S.L. Week 3345 (February 20, 1973).

[3] If the Court is concerned by any uncertainty as to the basis of the Sixth Circuit's decision, the proper disposition is not to deny the Writ, as Respondents suggest, but to vacate the judgment and remand the case to the Court of Appeals for an explanation of its order. *Taylor* v. *McKeithen*, 407 U.S. 191 (1972); *California* v. *Krivda*, 409 U.S. 33 (1972).

for costs was denied by the Sixth Circuit at some unknown time between August 29, 1972 and October 25, 1972.[1] That denial was issued before plaintiffs' petition for rehearing of November 3, 1972, and cannot have been due to any tardiness of that petition. On November 24, 1972, the Court of Appeals again denied costs and fees, this time passing on plaintiff's second application of November 3. Whatever the basis of this second decision, plaintiffs seek review in this Court of both that denial of costs and fees and the earlier denial which occurred sometime in September or October. This earlier decision was clearly on the merits and cannot have turned on the timeliness of a subsequent petition for rehearing.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

LOUIS R. LUCAS
WILLIAM E. CALDWELL
Ratner, Sugarmon & Lucas
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Petitioners

[1] Respondent concedes that this matter was not dealt with in the Sixth Circuit's opinion of August 29, 1972. Brief in Opposition, p.2.